87-2076

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

J & C, INC. and T-K CO.,
A Joint Venture - - - - - Petitioner

versus

COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC., and
MARK KOEBRICH - - - - - Respondents

On Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Fact That a Public Figure Defamation Plaintiff Is Not Named In a Broadcast In and Of Itself Negate Any Possibility That the Broadcast Was Made With Constitutional "Actual Malice?" Or May a Plaintiff In Such a Situation Resort to Common-Law Rules of Colloquium In Order to Prevail, So Long As He Otherwise Proves the Requisite "Actual Malice?"

PARTIES TO THIS PROCEEDING

The Petitioner is J & C, Inc. and T-K Co., a joint venture.

The Respondents are Combined Communications Corporation of Kentucky, Inc., and Mark Koebrich.

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a Joint Venture - - - - *Petitioner*

v.

COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC. and
MARK KOEBRICH - - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals of Kentucky was ordered "depublished" by the Kentucky Supreme Court, and therefore does not appear in any official or unofficial reports known to the Petitioner.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the Order sought to be reviewed is March 22, 1988. It does not show a different date of entry. Under Kentucky Rules of Court, no petition or application for rehearing of this Order was possible.

The Petitioner believes that this Court has jurisdiction to review the Order and its antecedent opinions by writ of certiorari under and by virtue of the provisions of 28 United States Code Section 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED IN THIS CASE

United States Constitution
Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

When viewed in its entirety, this is an extremely complex case. However, the issue upon which the Petitioner relies in this pleading is relatively simple, so that the background information necessary to present it should consume little space.

During the late 1970's the Thompson-Kissel Company, a Louisville commercial refrigeration company, and J & C Inc., a corporation composed solely of its owner, Glen Crum formed a joint venture, J & C Inc., and T-K Co., for the purpose of selling a substance composed of recycled sewage sludge and wood chips to the owners of strip-mined lands in Kentucky and Southern Indiana. The Plaintiffs below included Thompson-

Kissel Company, its sole owner H. W. Thompson, and the Joint Venture. Glen Crum was not a litigant below.

Just when the Joint Venture was ready to deliver its product, named Lou-Organite, to landowners, the Defendants below, Combined Communications Corporation of Kentucky, Inc., which owned television station Channel 32 in Louisville, Kentucky, at the time, and its Indiana "investigative reporter," Mark Koebrich, began a series of 19 viciously defamatory broadcasts about the Joint Venture and its principals that lasted from August 6, 1980 until January 18, 1981.

During the course of this series of broadcasts, the Defendants frequentiy referred to the Joint Venture's product, which had been certified as environmentally safe by every agency concerned with such matters, as "crap," just plain "sewage," and most favorably as "sludge from the sewers of Louisville," They also juxtaposed their inflammatory broadcasts about the Joint Venture and its principals with stories about a notorious local chemical polluter, Donald Distler, who had been convicted of dumping thousands of gallons of the most noxious and dangerous chemicals into Louisville's sewers, and other environmental disasters. Finally, in two separate broadcasts, one of which is the subject of this Petition, the Defendants stated that the Plaintiff H. W. Thompson and the Plaintiff Joint Venture, respectively, were the subjects of "civil and criminal charges," which was no truer than most of the other material in the sensationalist series of broadcasts.

After a two week trial, a jury of the Jefferson Circuit Court awarded the Plaintiff Thompson $120,000 in damages, the Plaintiff Thompson-Kissel Company $56,000, and the Joint Venture $2,689,000. All but $1,000 of the latter award was for business lost due to the broadcasts. The jury's awards were based upon false light invasion of privacy stemming from all 19 broadcasts as to each of the Plaintiffs. In addition, as to the Plaintiffs H. W. Thompson and the Joint Venture, the jury made a finding that they were libeled as a result of the false accusations of civil and criminal charges pending against them. The jury found for the Defendants upon the claim of the Plaintiff Thompson-Kissel Company for libel.

By post-trial order, the Jefferson Circuit Court set aside the damage award to the Joint Venture upon the purported ground that the Plaintiff failed to prove lost profits with the specificity required by Kentucky law. The court refused to set aside any of the other of the jury's awards.

Both parties appealed the Court's final judgment to the Kentucky Court of Appeals. In its final opinion, the Court vacated the award to the Thompson-Kissel Company upon the ground that only live persons can recover under a false light theory in Kentucky and that the jury had found against this Plaintiff on its libel claim, leaving nothing left to try as to it. The Court of Appeals reversed the jury's award to the Plaintiff Thompson and ordered a new trial upon all of his claims upon the ground that the trial

judge did not give a Constitutional "actual malice" instruction to the jury on Thompson's libel claim (the trial court had determined that Thompson was not a limited purpose "public figure," the Court of Appeals disagreed). Finally, the Court of Appeals affirmed the trial Court's vacating of the jury's award to the Joint Venture. However, its grounds for doing so were not those of the trial court. Instead, the appellate Court stated that (a) the Joint Venture could not maintain a "false light" claim; and (b) that the Joint Venture had not shown with "convincing clarity" that the Defendants illustrated Constitutional actual malice in publishing the broadcast that had formed the basis of the Joint Venture's libel claim.

The Petitioner seeks review only of this latter portion of the opinion of the Court of Appeals of Kentucky, which was left undisturbed by the Supreme Court of Kentucky's denial of the motion of the Plaintiffs below for discretionary review, which denial took place on March 22, 1988.

The Circuit Court submitted the Joint Venture's libel count to the jury at the trial of this case based upon the content of the Defendant's news broadcasts of December 18, 1980. The first such broadcast, which aired at 5:30 p.m. Eastern Standard time, read as follows:

> TELEPROMPTER: More than 20,000 tons of sewage sludge from Louisville, illegally stored on property in Clark County, may soon be the target of more court action.

Our Indiana Bureau Chief, Mark Koebrich, reports that if efforts to remove the sludge aren't under way soon, the Clark County Prosecutor's office will initiate a series of $300-a-day-fines.

MR. KOEBRICH (Video): The first truckloads of sludge arrived in Clarksville in mid-August unannounced and unwanted.

FEMALE INTERVIEWEE: I'm against it, and it appears that everyone else down here that has property is completely against both the dumping, the odor, the possible contamination of our well water, because we do not have city water.

MR. KOEBRICH (Video): In a similar move not more than a month later, the firm started trucking the stuff to a site east of Charlestown with the same results.

MALE INTERVIEWEE: I don't like to see my community made a place to pile crap.

MR. KOEBRICH (Video): Angry Indiana officials ordered the firm to stop hauling and clear both sites, a directive they've ignored. So now, the Clark County Prosecutor's office is getting tough. Civil and criminal actions have been filed citing violations of zoning regulations at the Charlestown site, the land clearly designated for agricultural use only, not industrial or commercial use.

Clark County Prosecutor, Dan Donahue, says he'll press harder if necessary.

MR. DONAHUE: If immediate action isn't undertaken by the first of the year then we will begin to take immediate action on a daily basis.

MR. KOEBRICH (Video): A daily basis means a $300-a-day fine for every day the sludge remains

where it is. Attempts to reach the Louisville firms involved in the sludge operation were unsuccessful.

Mark Koebrich, 32 Alive News, Indiana.

The next broadcast aired on the evening of December 18, 1980, at 11:00 p.m., Eastern Standard Time. It read as follows:

> TELEPROMPTER: More than 20,000 tons of sewage sludge from Louisville, illegally stored on property in Clark County, may soon be the target of more court action. The Louisville firm that trucked the material to sites in Clarksville and Charlestown late last summer, has so far ignored directives to remove it.
>
> Some civil and criminal action has already been taken, but Clark County Prosecutor, Dan Donahue says he'll press harder, if necessary.
>
> MR. DONAHUE: If immediate action isn't undertaken by the first of the year, then we will begin to take immediate action on a daily basis.
>
> MR. KOEBRICH (Video): Okay. So that we're talking about a fine—
>
> MR. DONAHUE: (Interrupting) We're talking about a maximum $300 fine under the ordinance.
>
> TELEPROMPTER: That's $300 a day in penalties. No comment today from the sludge firms in Louisville involved in the operation.

The transcripts of these broadcasts was located in the Appendix for the Court of Appeals of Kentucky, pp. 162-164.

The Plaintiffs proved at the trial of this case that the Defendant Koebrich knew at the time of these broadcasts that no civil or criminal charges had ever

been filed by any agency or authority against any of the Plaintiffs, including the two "firms" (the Joint Venture and the Thompson-Kissel Company) among them (Transcript of Evidence, 8th day, Vol. I, p. 57). The Clark County Prosecutor told Koebrich only that such charges were possible against the Plaintiffs if he determined that Lou-Organite or the recycled material from which it was made contained a legal contaminant. As the Defendants well knew, such a determination was never made (Donahue Depo., p. 29). At no time before or after the broadcast recited above were any civil or criminal charges filed against any of the Plaintiffs relating to their activities in and around Clarksville or Charlestown, Indiana.

In a Petition for Rehearing filed with the Court of Appeals, the Defendants pointed to the fact that civil and criminal charges had indeed been filed against the landowner of the site in Charlestown, Indiana, used by the Joint Venture. This gentleman's name was Oscar Combs.

With this fact as its sole basis, the Defendants in their Petition for Rehearing argued for the first time before any Court that their accusation concerning civil and criminal charges in the December 18, 1980, broadcasts was "true" as a matter of law, thereby negating any possibility that the broadcasts were motivated by Constitutional "actual malice," (Petition for Rehearing for Kentucky Court of Appeals, Pages 1-3).

The Plaintiffs, of course, responded that the broadcasts nowhere mentioned Oscar Combs, or made any

attempt to indicate that it was a "landowner" or any other person or entity distinct from "the firm" mentioned in the broadcasts who was the recipient of the civil and criminal charges set forth in them. In summary, said the Plaintiffs, these broadcasts gave, ". . . the listener or viewer the *inescapable impression* that the *charges were brought against the Joint Venture.*" (Response to petition for Rehearing before the Kentucky Court of Appeals, pp. 1-3).

Incredibly, the Court of Appeals of Kentucky brought Defendants' cockamamie argument (Final Opinion, Court of Appeals, pp. 10-12). At p. 11 of its opinion, it opined as follows:

> As to the December 18, 1980, broadcast, we agree that the evidence can not meet the required standard of review [that of Constitutional "actual malice"]. There had in fact been civil and criminal actions filed against the property owner at the Charleston [sic] site. Consequently, it cannot be said that the broadcast was made with the knowledge that the information was false or with reckless disregard of its truth or falsity. Although it may be argued that the broadcast could be interpreted to infer that the charges were against "the firm" (Joint Venture) since we have herein held that a business entity has no right of action for being placed in a "false light," the evidence fails to show actual malice with convincing clarity and the libel claim of the joint venture should be dismissed.

The Court's purported authorities for this holding, which holding the Petitioners are now attacking, were

the cases of *New York Times* v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), *St. Amant* v. *Thompson*, 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968) and *Bose* v. *Consumers' Union of the United States, Inc.*, 466 U. S. 485, 514, 104 S. Ct. 249, 80 L. Ed. 2d 502 (1984), (Final Opinion of the Court of Appeals of Kentucky, pp. 10-12).

ARGUMENT

The Mere Fact That a Defamation Plaintiff Must Resort To Common Law Colloquium Does Not In and Of Itself Negate Any Possibility That He Can Prevail Against a Media Defendant.

The Opinion of the Court of Appeals of Kentucky in this case essentially stands for the proposition that a defamation plaintiff may never recover from a media defendant entitled to avail itself of the Constitutional privilege to attack "public figures" when he has to resort to common law rules of colloquium to prevail.

This proposition is absurd on its face. If permitted to stand, it will permit the Defendants in this case to get away with the most vicious libel by hiding behind one of the oldest tricks in the mudslinger's book: not directly naming the person to whom a calumny is directed.

Even in the rarefied world of the cases interpreting the rights of a free press, this Court has basically deferred to the common law of defamation whenever appropriate, see *Gertz* v. *Robert Welch*, 418 U. S. 323, 94 S. Ct. 2997, 3010-3102, 41 L. Ed. 2d 789 (1974). So far as the Petitioner has been able to determine, no

federal court, and certainly not this Court, has ever held that the widely applied common-law rules of colloquium were somehow superseded by the Constitutional privilege to attack public figures so long as no "actual malice" was proven.

These rules, of course, prevent the very tactic approved by the Kentucky Court of Appeals in the case at bar. As stated by the Kentucky Court of Appeals, then the state's highest Court, in the case of *Axton-Fisher Tobacco Co.* v. *Evening Post Co.,* 169 Ky. 183 S. W. 269, 274 (1916), the rules are that:

> . . . when a publication, reading the whole of it, is plainly directed at a person or corporation . . . the person or corporation intended to be and that is in fact assailed by the publication may maintain an action for libel as freely as if he or it were particularly named or described in the publication.

No intelligent auditor of the December 18, 1980 broadcast by Channel 32 could come to any reasonable conclusion other than that: (a) the "firm" mentioned in the story was the Joint Venture; and (b) that the "firm" was the object of the "Civil and criminal actions [that] have been filed citing violations of zoning regulations at the Charlestown site," or of the, "Some civil and criminal action [that] has already been taken," to quote the language of the early and late broadcasts, respectively of that day (Appendix for Ky. Court of Appeals, pp. 162-164).

The media constantly seek to covert their already very liberal privilege to attack "public figures" in the most robust manner into what is essentially an absolute

privilege to defame and traduce the reputations of such figures. The opinion of the Court of Appeals in this case ends the war in this arena in favor of the media. Any publication or broadcaster worth its salt can figure out a way to defame a person or corporation without directly mentioning the object of its attacks.

Of course, it may be argued that the Supreme Court of Kentucky put this spectre to rest by ordering the Opinion of the Court of Appeals to be "de-published," so that it will have no precedential value. This fact, of course, is of little solace to the Petitioner in this case. Furthermore, this Court may be assured that the argument at issue in this case will appear another day, and probably very soon, given the media's intense pre-occupation with "protecting" (i.e. expanding) its privileges in the First Amendment area. Finally, of course, Rule 17 of this Court gives no preference to published as opposed to unpublished opinions, and Petitioner believes that it is quite clear that the Kentucky Court of Appeals, ". . . has decided an important question of federal law which has not been, but

should be, settled by this Court," Rule 17.1(c) of the Supreme Court.

Respectfully submitted,

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CERTIFICATE

We hereby certify that we have mailed true copies of this Petition to Wesley P. Adams, 2800 First National Tower, Louisville, Kentucky 40202 and John B. McCrory and William S. Brandt, Lincoln First Tower, Rochester, New York 14604, attorneys for the Respondents, upon this 17th day of June, 1988, as per Rule 28.3 of the Supreme Court of the United States.

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APPENDIX

No. 81CI-03556

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

H. W. Thompson, et al. - - - - - - *Plaintiffs*

v.

Combined Communications of Kentucky, Inc., et al. - - - - - - - *Defendants*

JUDGMENT—Entered November 18, 1985

This case having come on for trial on October 16, 1985, and the Plaintiffs appearing, in person, and by representative, and by counsel, and the Defendants appearing, in person and by counsel, and the Court having seated the jury, and the evidence having been presented by testimony and exhibits, and the jury having been instructed at the conclusion of the evidence, and the jury having returned the following verdict based upon the instructions and the interrogatories submitted to them:

> In publishing their television programs of January 8, 1981, relating to the plaintiff, *Thompson*, where Channel 32 reported that Thompson was "facing civil and criminal counts, do you believe from a preponderance of the evidence that that statement was false and tended to bring Thompson into public hatred, contempt or ridicule; or that they caused Thompson to be shunned or avoided or injured him in his business or occupation?
>
> 9 YES 3 NO
>
> In publishing their television program of January 8, 1981, relating to the plaintiff, *Thompson*, wherein

Channel 32 reported that Thompson was "facing civil and criminal counts, do you believe from a preponderance of the evidence that the defendants failed to exercise reasonable care and caution in checking on the truth or falsity of the defamatory character of the communication before publishing it?

11 YES 1 NO

In publishing their television program of December 18, 1980, relating to the *Thompson Kissel*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that this statement was false and tended to bring the Thompson-Kissel into public hatred, contempt or ridicule; or that they caused the Thompson-Kissel to be shunned or avoided or injured the business of Thompson-Kissel?

3 YES 9 NO

In publishing their television program of December 18, 1980, relating to the *Thompson-Kissel*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that Channel 32 failed to exercise reasonable care and caution in checking on the truth and falsity and the defamatory character, if any, of the communication before publishing it?

9 YES 3 NO

In their television programs of December 18, 1980, relating to the *Joint Venture*, where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that this statement was false and tended to bring the Joint Venture into public hatred, contempt or ridicule;

or that it caused the Joint Venture to be shunned or avoided; or injured the business of the Joint Venture?

9 YES 3 NO

In publishing their television programs of December 18, 1980, relating to the *Joint Venture,* where Channel 32 published that "civil and criminal actions have been filed", do you believe from a preponderance of the evidence that Channel 32 failed to exercise reasonable care and caution in checking on the truth and falsity and the defamatory character, if any, of the communication before publishing it.

9 YES 3 NO

Do you believe from a preponderance of the evidence that the defendants during any one or more of the publications of which you have heard evidence made false statements about Thompson placing him in a false light which would be highly offensive to a rea-reasonable person and that Channel 32 had knowledge of or acted in reckless disregard as to the falsity of the publicized material and the false light in which Thompson was placed.

10 YES 2 NO

Do you believe from a preponderance of the evidence that the defendants during any one or more of the publications of which you have heard evidence made false statements about Thompson-Kissel placing it in a false light which would be highly offensive to a reasonable person and that Channel 32 had knowledge of or acted in reckless disregard as to the falsity of the publicized material and the false light in which Thompson-Kissel was placed.

9 YES 3 NO

Do you believe from a preponderance of the evidence that the defendants during any one or more of the

publications of which you have heard evidence made false statements about Joint Venture placing it in a false light which would be highly offensive to a reasonable person and that Channel 32 had knowledge of or acted in reckless disregard as to the falsity of the publicized material and the false light in which Joint Venture was placed.

9 YES 3 NO

We, the jury, find for *H. W. Thompson* on his claim against the defendants, Mark Koebrich and Channel 32, and award him the following compensatory damages:

(a) for public disgrace, scorn and ridicule; $10,000.00

(b) injury to his business directly resulting therefrom; $50,000.00

(c) injury to his reputation and standing in the general public. $50,000.00

We, the jury, find for the plaintiff, Thompson, on his claim against the defendants for punitive damages and award him the sum of $10,000.00.

We, the jury, find for *Thompson-Kissel* on its claim against the defendants, Mark Koebrich and Channel 32, and award him the following compensatory damages:

(a) for public disgrace, scorn and ridicule; $10,000.00

(b) injury to his business directly resulting therefrom; $20,000.00

(c) injury to his reputation and standing in the general public. $25,000.00

We, the jury, find for the plaintiff, Thompson-Kissel, on his claim against the defendants for punitive damages and award him the sum of $1,000.00.

We, the jury, find for *Joint Venture* on its claim against the defendants, Mark Koebrich and Channel 32, and award him the following compensatory damages:

(a) for public disgrace, scorn and ridicule;	$ 0
(b) injury to his business directly resulting therefrom;	$2,688,000.00
(c) injury to his reputation and standing in the general public.	$ 0

We, the jury, find for the plaintiff, Joint Venture, on his claim against the defendants for punitive damages and award him the sum of $1,000.00.

The Court having considered the verdict and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The Plaintiff, H. W. Thompson, shall recover from the Defendant, Mark Koebrich, and the Defendant, Combined Communications of Kentucky, Inc., jointly and severally, the sum of $110,000.00 in compensatory damages and $10,000.00 in punitive damages, plus interest from the date of judgment and his Court costs herein expended, for all of which execution may issue.

2. The Plaintiff, Thompson-Kissel Company, shall recover from the Defendants, Mark Koebrich and Combined Communications of Kentucky, Inc., jointly and severally, the sum of $55,000.00 in compensatory damages and $1,000.00 in punitive damages, plus interest from the date of judgment and its Court costs herein expended, for all of which execution may issue.

3. The Plaintiff, T-K Co. and J & C, Inc., a Joint Venture, shall recover from the Defendants, Mark Koebrich and Combined Communications of Kentucky, Inc.,

jointly and severally, the sum of $2,688,000.00 in compensatory damages and $1,000.00 in punitive damages, plus interest from the date of judgment and its Court costs herein expended, for all of which execution may issue.

There being no just cause for delay, this is a final and appealable judgment.

(s) Edwin Schroering, Jr.
Judge
Jefferson Circuit Court
Division Twelve

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, postage pre-paid, to Mr. Wesley P. Adams, Jr., Goldberg and Simpson, 2800 First National Tower, Louisville, Kentucky 40202, this 5th day of November, 1985.

(s) William W. Lawrence
William W. Lawrence

No. 81CI 03556

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

H. W. Thompson, Et Al. - - - - *Plaintiff*

v.

Combined Communications of Kentucky, Inc., Et Al. - - - - - - *Defendant*

OPINION AND ORDER—Entered April 21, 1986

On November 5, 1985, after a nineteen (19) day "libel and false light" trial in the Jefferson Circuit Court, the jury returned verdicts in favor of plaintiffs, H. W. Thompson (Thompson), Thompson Kissel Company (Thompson-Kissel), and Joint Venture (Joint Venture), against Mark Koebrich and Combined Communications of Kentucky, Inc. for varying amounts, to-wit:

1. For Thompson, $110,000.00 compensatory damage and $10,000.00 punitive damages.
2. For Thompson-Kissel, $55,000.00 compensatory damages and $1,000.00 punitive damages.
3. For Joint Venture, $2,688,000.00 compensatory damages plus $1,000.00 punitive damages.

Within the prescribed time, defendants moved this Court for a Judgment Notwithstanding The Verdict and for a new trial. Defendants main thrust is directed against the Jury's verdict of $2,688,000.00 in favor of an entity called the "Joint Venture".

The proof, during the trial, showed that the "Joint Venture" is an entity which was organized by Mr. Thomp-

son and his partner Crum for the purpose of obtaining, storing, mixing and selling the material which was obtained under a contract from the Metropolitan Sewer District.

Plaintiffs contended that treated material was marketable as a soil supplement called "Lou-Organite" and that they suffered business losses because of the actions of the defendant in publicizing television news stories downgrading their product. The defendants contend that there is insufficient evidence to show a business loss and that plaintiffs did not establish that the product itself was marketable or saleable.

It was the plaintiffs' burden to prove with reasonable certainty that there were lost profits. Since this was a new business, i.e., there were no other businesses like it and the company itself had no track record, it is the rule in Kentucky that lost profits are required to be established with reasonable certainty.

The Kentucky Supreme Court has adopted the position espoused by the Restatement of Contracts (second), comment b:

> However, if the business is a new one . . . proof will be more difficult. Nevertheless, damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys, and analysis, business records and similar enterprises, and the like. *Pauline's Chicken Villa, Inc.*, v. *K.F.C. Corporation*, Ky., 701 S. W. 2d 399 (1985).

The Supreme Court recognized that there is no single definition of "reasonable certainty" to be used as a yardstick. Thus, it is the plaintiff's burden to introduce evidence which will "virtually eliminate all the uncertain variables". *Pauline's Chicken Villa, Inc.* v. *K.F.C. Corporation, supra.* The evidence must be such that the Jury does not have to speculate or arrive at their decision by con-

jecture, speculation or surmise. *Western Union Telegraph Company* v. *Ramsey*, Ky., 88 S. W. 2d 675 (1935).

The defendants properly preserved their objections on this account in their Motions for a Directed Verdict at the end of the plaintiff's proof and also at the end of the trial. Thus, the Court must now consider whether or not the evidence is sufficient to support the verdict of the Jury in the light of the law.

Mr. Thompson's partner, Mr. Crum, testified that the "Joint Venture" product "Lou-Organite" was "set" at $40.00 per ton. Unfortunately, Mr. Crum's testimony as to the market price was wholly uncorroborated since there was never any testimony presented that "Lou-Organite" had ever sold for this market price. Only one person testified as to the purchase of "Lou-Organite". Mr. Frank Otte, a nurseryman, bought it in an effort to see if it was useful as a potting supplement. He potted some of it and planted certain of his plants in it. After a length of time, he concluded that it was not suitable for that purpose.

Although Mr. Otte was the only person that purchased any of the "Lou-Organite", he paid ninety-five cents per ton, far below the $40.25 per ton price which Mr. Crum had established.

The only other testimony as to the market price of the "Lou-Organite" was that of the company's CPA, Mr. Joseph Lusk. Mr. Lusk did not testify as to the demand for this product or its marketability. He testified as to what the company's profits were if it had been able to sell the product available in accordance with the contracts that the company had with the M.S.D. These computations were based on the premise that all of the "Lou-Organite" produced could be sold at a net profit of $8.00 per ton. Although the parties stipulated that there was a market for a fill to cover strip mine areas in Eastern Kentucky, it

was never properly connected by the proof to the "Lou-Organite".

The plaintiffs made a valiant effort to establish that the "Lou-Organite" was marketable, and was effective as a soil medium. During the testimony of Mr. Crum, he spoke of a study made by the University of Kentucky involving the use of sludge from Louisville, Eastern Kentucky and West Virginia. When Mr. Crum attempted to introduce the results of the study, the defendants objected to the results of the study being recounted without a foundation being laid. The objection was conditionally overruled. The plaintiffs failed to produce the person who made the study or any other competent witness who could lay the foundation. The defendants restated their objection after the close of all evidence. This evidence was, thus, not admissible and should not have been considered by the Jury.

The Court believes that the plaintiffs did not establish, with reasonable certainty, their burden as required by the above cited cases. Thus, that portion of the verdict of the Jury in favor of the "Joint Venture" which awards $2,688,000.00 compensatory damages and $1,000.00 punitive damages should be set aside. However, the findings of the Jury as to the other plaintiffs, Thompson and the Thompson Kissel Company, are supported by sufficient proof and the plaintiff's Motion with respect to those findings should be overruled.

ORDER

Motion having been made and the Court having considered the defendants' Motion for a Judgment Notwithstanding the Verdict on the Judgment of this Court dated the 18th day of November, 1985, be and the same is hereby sustained only as to that portion of the Judgment which

applies to the award of compensatory and punitive damages to the "Joint Venture" in the respective sums of $2,688,000.00 compensatory damages and $1,000.00 punitive damages. The defendants' Motion for a new trial is overruled. This is a Final Order.

(s) Edwin Schroering, Jr.
Edwin A. Schroering, Jr., Judge
Date April 21, 1986

Copy To:
William W. Lawrence/H. Joseph Marshall
Rebecca Westerfield/Wesley P. Adams

COURT OF APPEALS OF KENTUCKY

No. 86-CA-1243-MR

J. & C. Inc., and T-K Co.,
a joint venture - - - - - - - *Appellant*

v.

Combined Communications Corporation
of Kentucky, Inc.; and
Mark Koebrich - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Judge
Action No. 81-CI-03556

AND

No. 86-CA-1298-MR

Combined Communications Corporation
of Kentucky, Inc.; and
Mark Koebrich - - - - - - - *Appellants*

v.

H. W. Thompson, Individually and
Thompson-Kissel Company - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Judge
Action No. 81-CI-03556

ORDER GRANTING PETITION FOR REHEARING AND MODIFYING THE OPINION ON ITS FACE

BEFORE: GUDGEL, LESTER, and WEST, Judges.

GUDGEL, JUDGE: The Court having considered the Petition for Rehearing and the Response thereto, and having been sufficiently advised, it is ORDERED that the Petition is hereby GRANTED to the extent that the opinion rendered August 14, 1987, is MODIFIED on its face by the substitution of the attached pages 1, 9, 10, 11, 12, and 13 for the corresponding pages in the opinion as originally rendered.

ENTERED: December 11, 1987

(s) Paul D. Gudgel
Judge, Court of Appeals

OPINION RENDERED: AUGUST 14, 1987; 3:00 P.M.
TO BE PUBLISHED
AS MODIFIED: DECEMBER 11, 1987; 10:00 A.M.

COURT OF APPEALS OF KENTUCKY

No. 86-CA-1243-MR

J. & C. Inc., and T-K Co.,
a joint venture - - - - - - - *Appellant*

v.

Combined Communications Corporation
of Kentucky, Inc.; and
Mark Koebrich - - - - - - - *Appellees*

Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Judge
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Appeal from Jefferson Circuit Court
Honorable Edwin A. Schroering, Judge
Action No. 81-CI-03556

REVERSING AND REMANDING

BEFORE: LESTER, GUDGEL and WEST, Judges.

WEST, JUDGE. This is an appeal and cross-appeal arising out of an action for libel and invasion of privacy. The plaintiffs below were H. W. Thompson, the Thompson-Kissel Company, and a business we will refer to simply as the joint venture. The defendants were Combined Communications Corporation, owner of WLKY (Channel 32) television station and Mark Koebrich, a reporter for Channel 32.

In June, 1979, Mr. Thompson, owner of a commercial refrigeration company (Thompson-Kissel), joined forces with a Glen Crum and his partner (J. & C. Co Inc.) to form the joint venture. Mr. Crum had developed an idea that "sludge" or dry cake material produced by sewage treatment plants could be mixed with other ingredients and used to reclaim or revegetate strip-mined lands. The joint venture entered into a contract with the Louisville Metropolitan Sewer District (MSD) to remove a stockpile consisting of 181,501 tons whereby it would receive $13.00 per ton from MSD. The plan was to haul off the sludge, mix it with other ingredients, such as wood chips, and sell the resulting product to coal companies for use in reclaiming strip mined lands. The plaintiffs apparently encountered problems and protests when they began searching for a site for storage and mixing of the product. Some articles appeared in Louisville newspapers indicating that the trio could find no location in Kentucky and that a site had been selected near Clarksville, Indiana. An article in the Louisville Times on August 5, 1980, reported that residents living near the temporary storage site had "complained about the odor from the sludge and about droppings from trucks" and that numerous Kentucky counties had denied lands for storage to the appellees.

The following day, Channel 32 began telecasting a series of news stories regarding the joint venture's project. These stories included reports of protests of local residents, news of a Clarksville Town Board meeting and an expected unfavorable vote, plans for a new proposed storage site and efforts in that direction, and finally a report that Thompson was "facing civil and criminal counts." These broadcasts spanned a period from August 1980 to January 1981, a time when newspaper articles were also frequently appearing in the Louisville Times and Courier-Journal regarding this project.

On April 15, 1981, the plaintiffs filed their complaint against the defendant television station and its reporter, alleging libel and an invasion of privacy ("false light") as the causes of action. The case proceeded to trial before a jury which returned verdicts for all three plaintiffs. We assume from the interrogatories to the jury that their verdict was on both causes of action for Mr. Thompson and the joint venture, but only for Thompson-Kissel Company as to the invasion of privacy claim. Awards to the three defendants, without distinguishing between damages for false light and damages for libel, totalled $2,865,000.

Upon a motion for judgment notwithstanding the verdict, the court set aside the award to the joint venture. Defendants below appeal from the judgment awarding damages to Thompson-Kissel and Mr. Thompson. Plaintiffs cross-appeal from the order setting aside the award to the joint venture.

I. The "False Light" Action

The complaint alleged that defendants had placed Thompson-Kissel Company (Mr. Thompson's refrigeration business) in a "false light" thereby invading its right

of privacy.[1] The jury found for the joint venture and Thompson-Kissel on this claim. In its motion for judgment NOV and on appeal, defendants have argued that there is no cause of action for invasion of the right of privacy on behalf of a corporation or business entity. We agree.

We believe the law is well settled that the right of privacy tort developed to "protect the feelings and sensibilities of human beings, rather than to safeguard property, business, or other pecuniary interests." *Maysville Transit Co.* v. *Ort*, 296 Ky. 524, 177 S. W. 2d 369, 370 (1944). Absent a specific statutory right of privacy, corporations and business entities have no cause of action for the "false light" tort. *Tomlin* v. *Taylor*, 290 Ky. 619, 162 S. W. 2d 210, 213 (1942).

Accordingly, the judgments on that cause of action in favor of the two businesses must be reversed. Appellees apparently concede the error, but claim it cannot be considered on appeal due to defendant's failure to raise it prior to trial. It appears that this defense was not asserted until after trial in appellant's motions for JNOV and for a new trial. We are hesitant to allow parties to raise claims or defenses on appeal that were not raised below. *Lawrence* v. *Risen*, Ky. App., 598 S. W. 2d 474 (1980). However, we have concluded that this cause must be reversed and remanded for retrial on other grounds which we will discuss in this opinion. As such, we cannot allow the case to be retried under a theory of liability which has specifically been rejected as a matter of law in this Commonwealth.

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[1]This same allegation was made regarding the joint venture, however, as mentioned previously, the court below set aside the jury award to it on grounds that its damages were too speculative to sustain the verdict.

In *Vinson* v. *Gobrecht*, Ky. App., 560 S. W. 2d 242 (1977), the trial court instructed the jury under principles of comparative negligence. Of course, that was several years prior to *Hilen* v. *Hays*, Ky., 673 S. W. 2d 713 (1984), and the adoption of comparative negligence in Kentucky. Even though the jury verdict in *Vinson* indicated a finding of contributory negligence which should bar the claim, this Court reversed for a new trial, holding that it would amount to a manifest injustice to direct the trial court to enter a judgment which resulted from erroneous instructions. *Vinson, supra*, at 243. CR 61.02. While the *Vinson* Court found that the issue had been preserved by specific objections during trial and in the case at bar the issue was not raised until the motion for JNOV, nonetheless, we believe that to allow recovery by a corporation or business entity for an action that is "personal" to individuals would be contrary to the law of the Commonwealth and thus constitute manifest injustice. CR 61.02.

Assuming the evidence is the same on retrial, only Mr. Thompson individually would be entitled to an instruction on the "false light" invasion of privacy.

II. THE LIBEL ACTION—"PUBLIC FIGURE vs. PRIVATE INDIVIDUAL"

Appellant's second claim on appeal is that the court below improperly applied a negligence standard rather than an actual malice standard to prove liability for actual damages. According to appellants, Mr. Thompson was a limited purpose public figure and as such, was required to prove that the alleged defamation was published with "actual malice." *New York Times* v. *Sullivan*, 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) the Court discussed the public

figure category more fully, noting that some individuals "occupy position of such pervasive power and influence that they are deemed public figures for all purposes." *Id.* at 345, 94 S. Ct. at 3009. However, it is more common to find individuals who become involved in a public controversy and thus are public figures only in regard to that particular controversy. *Id.* more recently, courts have begun applying a two-part inquiry for determining whether a plaintiff is a limited purpose public figure. *Marcone* v. *Penthouse Intern'l Magazine for Men,* 754 F. 2d 1072 (3rd Cir. 1985). It is well settled that the classification of a plaintiff as a public or private figure is a question of law to be determined initially by the trial court and scrutinized carefully by an appellate court. *Wolston* v. *Reader's Digest Ass'n., Inc.,* 443 U. S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979).

The court must consider first, whether the alleged defamation involves a public controversy, and second, the nature and extent of plaintiff's involvement in that controversy. *Marcone, supra,* 754 F. 2d 1082. In *Time, Inc.* v. *Firestone,* 424 U. S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976), the Court rejected equating "public controversy" with all disputes if interest to the public, holding that the Firestone's marital difficulties were private in nature. A public controversy has generally been defined as a "real dispute, the outcome of which affects the general public or some segment ot it", other than the immediate participants of the dispute. *Waldbaum* v. *Fairchild Publications, Inc.,* 627 F. 2d 1287, 1296 (D. C. Cir.) *cert. denied,* 449 U. S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980). Generally, it will be a topic upon which sizeable segments of society have different, strongly held views. *Lerman* v. *Flynt Distributing Co., Inc.,* 745 F. 2d 123 (2nd Cir. 1984), *cert. denied,* — U. S. —, 105 S. Ct. 2114 (1985).

With this background, there can be no question that there was a public controversy here. Hauling, storing, and selling of sewer sludge raises issues on which there will be differeing opinions, even where, as here, the process is for a valuable purpose such as reclaiming land. The controversy was not created by WLKY as the Louisville papers had been following the efforts of plaintiffs for some time prior to defendants' first news telecast. Appellees argue that because only a small number of persons reside near the attempted Indiana site, there was no "controversy" beyond the borders of an almost unpopulated neighborhood. However, we do not find the population of a given area to be dispositive of whether or not a particular subject is a matter of public controversy.

Second, we must look to the nature and extent of Thompson's involvement in the controversy. In general, the plaintiff must voluntarily thrust himself into the vortex of the dispute by actively participating in the public issue in a manner intended to obtain attention. *Marcone, supra,* at 1083. Courts have generally looked to the voluntariness of the individual's participation, the extent of his access to the media for effective communication and the prominence of his individual role. *Clark* v. *Amer. Broadcasting Corp.*, 684 F. 2d 1208, 1218 (6th Cir. 1982), *cert. denied,* 460 U. S. 1040 (1983).

Other cases we have examined provide a framework for determining this question. For example, a meat producer that aggressively advertised its product in the media was treated as a limited purpose public figure for comment on the quality of the product. *Steaks Unlimited, Inc.* v. *Deaner,* 623 F. 2d 264 (3rd Cir. 1980). An agent who held news conferences to attract media attention for himself and his client was a public figure in that context. *Woy* v. *Turner,* N.D. Ga., 573 F. Supp. 35 (1983). Finally, a

manufacturer of Laetrile, a controversial drug used to treat cancer was held to be a limited purpose public figure when it issued a press kit to media representatives to counter adverse publicity it had received. *Foodscience Corp.* v. *McGraw-Hill, Inc.*, S.D. N.Y., 592 F. Supp. 367 (1984).

From our review of the many cases dealing with this question, we conclude that Thompson and the joint venture were also limited purpose public figures. The record before us indicates tht plaintiffs voluntarily sought publicity and media coverage of their product and process and had apparent access to the media during the course of the controversy. Thompson himself was the project's main promoter, speaking at public meetings, issuing press kits to the media, and even "sampling" some of his product on television and at public meeting to prove that it was safe.

We believe the court below erroneously concluded that because plaintiffs were not public "officials", the negligence standard should be applied. However, the law is clear, as illustrated by the cases cited herein, that limited public "figures" are also subject to the actual malice standard. We also note that corporations have been treated as public figures under the same tests set forth in this opinion. *Foodscience, supra,* at 364; *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U. S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). We conclude that the joint venture thrust itself into the public controversy that attends the moving and storing of this particular product and thus it also became a corporatae public figure.[2]

We hold that the instructions to the jury on simple negligence were improper. This error was not cured by the

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[2]The jury rejected Thompson-Kissel Company's claim for libel under the simple negligence standard, and there is no appeal from that portion of the judgment. Thus, we need not decide whether Thompson-Kissel was a corporate public figure.

"false light" instructions which did include actual malice elements nor was it waived by appellant's request for a "single recovery" on both claims. This request was proper under *McCall* v *Courier-Journal*, Ky., 623 S. W. 2d 882 (1981), and counsel sufficiently objected to the instructions given so as to preserve this issue before our Court.

III. ACTUAL MALICE

Because plaintiffs were limited purpose public figures, they were required to prove that defendant's remarks were made with actual malice. Actual malice has been defined as publishing material with knowledge that it was false or with reckless disregard of whether it was false or not. *N. Y. Times* v. *Sullivan, supra,* 376 U. S. at 280. "Reckless disregard" has further been defined to mean publishing "with a high degree of awareness of probable falsity, or entertaining serious doubts as to its truth." *St. Amant* v. *Thompson,* 390 U. S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968).

Appellants argue that neither the false light claim nor the libel action can stand as there was insufficient evidence to support a verdict under the actual malice standard. Our review on appeal in a First Amendment case has recently been held to be subject to a stricter standard than the "clearly erroneous" rule of CR 52.01. In *Bose Corp.* v. *Consumers Union of the* U.S., Inc., 466 U.S. 485, 514, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), the Supreme Court held that appellate judges in First Amendment cases:

> . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.

With this standard in mind, we must turn to the facts of the case to determine whether there is clear and con-

vincing evidence of actual malice. The Court below permitted two broadcasts to go to the jury on the libel counts. The December 18, 1980, broadcast was the basis of the libel claim of the joint venture and the January 8, 1981, broadcast which stated that Thompson was "facing criminal and civil counts."

As to the December 18, 1980, broadcast, we agree that the evidence can not meet the required standard of review. There had in fact been civil and criminal actions filed against the property owner at the Charleston site. Consequently, it cannot be said that the broadcast was made with the knowledge that the information was false or with reckless disregard of its truth or falsity. Although it may be argued that the broadcast could be interpreted to infer that the charges were against "the firm" (joint venture) since we have herein held that a business entity has no right of action for being placed in a "false light," the evidence fails to show actual malice with convincing clarity and the libel claim of the joint venture should be dismissed.

Regarding the broadcast of January 18, 1981, Mr. Koebrich, the reporter, testified that this statement was based on information from the county prosecutor and from the county planning commission attorney that they were investigating the possibility of filing charges. Koebrich testified that he believed "facing" meant something less than that charges were actually being filed.

The prosecutor testified that he told Koebrich that any charges were absolutely contingent upon proof that the by-product was a legal contaminant. Furthermore, he stated that he had never said any of the plaintiffs were "facing civil or criminal charges." However, his recollection was that he had said the state was "go" on bringing charges, contingent on the results of the lab tests on the product. The attorney for the planning commission testified that they were looking at the "possibility" of a violation of

criminal statutes or regulations by "Mr. Thompson and his companies."

Although we believe it is a close question under the clear and convincing standard, based on the discrepancies between what Koebrich was told and what he reported and based on the fact that "facing charges" could be subject to different interpretations, we conclude that there was sufficient evidence to go to the jury on question of actual malice.

It is unnecessary for us to address the remaining issues on appeal and the cross-appeal. Those complaints relate to the certainty of proof required for recovery of damages for loss of business. The cross-appeal complains that the court below erred in setting aside the two million dollar award to joint venture. Appellants complain that none of the awards for injury to business were sufficiently proven. However, in light of our holdings that corporations cannot recover for "false light," that the plaintiffs were required to prove actual malice to recover for libel and under that standard the joint venture's libel claim must be dismissed and Thompson's judgment reversed and remanded for retrial, the remaining issues are rendered moot. The clarify, we direct as follows:

1. *Thompson-Kissel* — the judgment awarding damages for false light invasion of privacy is reversed. As there is no appeal from the jury's refusal to find libel against it, its claims are dismissed.

2. *The Joint Venture*—the judgment allowing recovery for false light invasion of privacy is reversed. The action for libel is dismissed.

3. *H. W. Thompson*—the judgment is reversed and remanded for retrial on Thompson's false light and libel

claims pursuant to the "actual malice" standard set forth herein.

ALL CONCUR.

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SUPREME COURT OF KENTUCKY

87-SC-660-D
(86-CA-1243 & 86-CA-1298-MR)

J & C, Inc. and T-K Company,
A Joint Venture; H. W. Thompson,
Individually, and
Thompson-Kissel Company - - - - - *Movants*

v.

Combined Communications Corporation
of Kentucky, Inc., and
Mark Koebrich - - - - - - *Respondents*

Jefferson Circuit Court
No. 81-CI-03556

AND

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v.

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Jefferson Circuit Court
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Jefferson Circuit Court
No. 81-CI-03556

ORDER DENYING DISCRETIONARY REVIEW

The motions of the movants for a review of the decision of the Court of Appeals are denied.

It is further ordered that the original motion for discretionary review filed September 2, 1987, is dismissed as moot.

The opinion of the Court of Appeals is ordered not to be published.

Entered March 22, 1988.

(s) Robert F. Stephens
Chief Justice

87-2076

No. 87-2706

In The

Supreme Court of the United States

October Term, 1988

J & C, INC. and T-K CO., A Joint Venture,

Petitioner,

vs.

COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC., and MARK KOEBRICH,

Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENTS COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC. AND MARK KOEBRICH IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 87-2706

In The

Supreme Court of the United States

October Term, 1988

J & C, INC. AND T-K CO., A Joint Venture,

Petitioner,

vs.

COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC. AND MARK KOEBRICH,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

BRIEF FOR RESPONDENTS COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC. AND MARK KOEBRICH IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent Combined Communications Corporation of Kentucky, Inc. herein discloses the following: Combined Communications Corporation of Kentucky, Inc. was liquidated on February 16, 1984. At that time it was a wholly-owned subsidiary

of Combined Communications Corporation, which is, in turn, a wholly-owned subsidiary of Gannett Co., Inc.

OPINIONS BELOW

The opinions of the Kentucky Court of Appeals and the Circuit Court are found in Petitioner's Appendix ("PA") at 14a and 7a, respectively, and the Court of Appeals opinion is reported unofficially in 14 Media Law Reporter 2162. The order of the Supreme Court of Kentucky denying motions for discretionary review is found at PA 26a-27a.[1]

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Respondents are a television station and one of its news reporters. This is a libel and invasion of privacy-false light case brought by the Petitioner who is one of three original plaintiffs. Petitioner — the so-called Joint Venture — is a business entity whose damage claim for false light and libel was set aside by the trial court for failure to prove damages at trial with reasonable certainty. (PA 7a-11a). Thereafter, the Kentucky Court of Appeals dismissed the libel claim for failure to prove "actual malice" and dismissed the invasion of privacy-false light claim because the state law of Kentucky does not permit a business entity to recover for such a tort. (PA 14a-25a).

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[1] Where, as here, the Kentucky Supreme Court refused to review the decision of the Court of Appeals, petitioner's writ of certiorari should be addressed to the intermediate appellate court, not the highest court. L. Stern, *Supreme Court Practice*, (6th ed. 1986), p.142.

At trial, the evidence showed that the Metropolitan Sewer District in Louisville, Kentucky, operated a sewage treatment plant processing raw sewage. The end product of the treatment process was a substance called "dry cake" or "sludge". For several years the plant's daily output of sludge had been accumulating without disposal. In 1979, the Joint Venture entered into a contract with the Sewer District for the removal of the sludge. The Joint Venture hoped that the sludge that was to be removed could be mixed with other ingredients and that this "blend" could be used to reclaim and revegetate strip mined land in Kentucky.

The Joint Venture planned to transport the sludge to a storage site in Nelson County, Kentucky, for blending. However, local protests extensively reported by Kentucky newspapers and television forced the Joint Venture to look elsewhere for a storage site. The Joint Venture, through its principals, tried to convince the public generally, as well as local zoning and health officials, that the sludge was not a threat to the community. As might be expected, public controversy arose wherever and whenever the Joint Venture sought to obtain governmental approval to locate its sludge storage operations.

In late 1980, the Joint Venture arranged with a private landowner, Elmer Combs, to deposit the accumulated 20,000 tons of sludge on his land in Charlestown, Clark County, Indiana. On December 18, 1980, respondents' news program reported that civil and criminal actions for violation of Charlestown zoning regulations had been filed because of the open storage of the sludge on private property[2]. Apparently, the public and the Clark County authorities were anxious to rid Clark County of the sludge deposit on open land.

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[2] There were actually two broadcasts on December 18, 1980, but since they are virtually identical, they will be referenced as a single broadcast. A transcript of the December 18, 1980 broadcasts was a trial exhibit and is found in the Respondents' Appendix ("RA") at RA 7-8.

The Joint Venture's libel claim was limited to this December 18, 1980 broadcast[3] and was submitted to the jury on the Joint Venture's claim that the following italicized language was defamatory:

> Angry Indiana officials ordered the firm to stop hauling and clear both sites, a directive they've ignored. So now, the Clark County Prosecutor's office is getting tough. *Civil and criminal actions have been filed* citing violations of zoning regulations *at the Charlestown site,* the land clearly designated for agricultural use only, not industrial or commercial use.

In a single award, the jury awarded petitioner damages for false light and libel for $2,689,000. On motion for judgment notwithstanding the verdict, the trial court set aside the Joint Venture's award upon the ground that it was speculative and unsupported by trial evidence. (PA 7a-11a).

All parties appealed to the Court of Appeals of Kentucky, which on August 14, 1987 dismissed the Joint Venture's false light claim. Petitioner does not seek review of the dismissal of that purely state law claim. In a modified opinion of December 11, 1987, the Court of Appeals further dismissed the Joint Venture's libel claim upon the ground that the implicated broadcast of December 18, 1980 was true and that petitioner, which was found to be a limited purpose public figure, had failed to prove "actual malice". (PA 21a, 23a).

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[3] The limited scope of the Joint Venture's libel claim is conceded. (Petition, p. 5; *see* PA 1a-2a).

REASONS FOR NOT GRANTING THE PETITION

A. *This Case Does Not Raise Important Questions Of Federal Law.*

Petitioner spends little time discussing the "special and important" reasons why this Court should grant a writ of certiorari. (Rule 17.1, Rules of the Supreme Court of the United States). In fact, petitioner merely cites 28 U.S.C. § 1257(3), quotes the First Amendment to the Constitution, and ultimately concludes that "the Kentucky Court of Appeals, 'has decided an important question of federal law which has not been, but should be, settled by this Court' . . ." (Petition, pp. 12-13).

Petitioner states the following to be that "important question" presented for review:

> Does the fact that a public figure defamation plaintiff is not named in a broadcast in and of itself negate any possibility that the broadcast was made with constitutional "actual malice?" Or may a plaintiff in such a situation resort to common-law rules of colloquium in order to prevail, so long as he otherwise proves the requisite "actual malice?"

(Petition, p. i.)

As is apparent from the Court of Appeals opinion, the fact that the Joint Venture was not named in the broadcast had absolutely no effect upon the Court's decision to dismiss the libel claim. Contrary to what is suggested by petitioner's "questions", the Kentucky Court of Appeals assumed that the Joint Venture was named in the broadcast and then dismissed the libel claim for failure of proof of actual malice. As a result, even if the proposed question was an important one under federal law, which it is not, the question that petitioner posits for review does not arise from this record and was not addressed by the Kentucky courts.

B. ***The Courts Below Correctly Applied the Governing Law.***

Petitioner claims that the December 18, 1980 broadcast was libelous. The essence of that broadcast was that:

> Civil and criminal actions have been filed citing violations of zoning regulations at the Charlestown site, the land clearly designated for agricultural use only, not industrial or commercial use.

(RA 7).

In fact, civil and criminal actions *had been filed,* as reported. Elmer Combs, the landowner who was storing the sludge for the Joint Venture, had been charged with civil and criminal violations in connection with the storage of the Joint Venture's sewer sludge. (Copies of the criminal and civil charges are found at RA 1-2 and RA 3-5, respectively.) The fact that charges had been filed, the sting of the December 18 broadcast, is not controverted. The petitioner admitted in the Kentucky Court of Appeals that: "Civil and criminal actions were filed citing zoning violations at the Charlestown site where the Joint Venture stored . . . [sludge]." (Reply to Petition for Rehearing [in the Kentucky Court of Appeals], p.2). Before this Court, petitioner concedes that ". . . civil and criminal charges had indeed been filed against the landowner of the site in Charlestown, Indiana, used by the Joint Venture." (Petition, p. 8).

The allegedly libelous statement was "of and concerning" either landowner Combs (as argued by the respondents) or the Joint Venture (as argued by the petitioner). The Court of Appeals considered *both* possibilities and correctly held that, in either case, petitioner's libel action failed. (PA 23a).

If the reference in the December 18, 1980 broadcast was to Elmer Combs, then the Court of Appeals was correct in dismiss-

ing the Joint Venture's libel claim because the libel was not "of and concerning" the Joint Venture, and it was true as to Combs.

If the reference in the December 18, 1980 broadcast was to the Joint Venture, then the Court of Appeals was correct in dismissing the Joint Venture's libel claim because the Court of Appeals did precisely what this Court instructed it to do in *Bose Corp. v. Consumers Union,* 466 U.S. 485 (1984). It reviewed the evidence and concluded that: "[a]s to the December 18, 1980, broadcast, we agree that the evidence cannot meet the required standard of review," *i.e.*, actual malice. (PA 23a).

It is well-settled that under the First Amendment a plaintiff who is a public figure can recover for libel only if he demonstrates by clear and convincing evidence that the defendant knew that his statement was false or that he subjectively entertained serious doubts as to the truth of the statement. *New York Times v. Sullivan,* 376 U.S. 254 (1964); *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964); *St. Amant v. Thompson,* 390 U.S. 727, 731 (1968); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 335 n.6 (1974); *Time Inc. v. Hill,* 385 U.S. 374 (1967); *Sparks v. Boone,* 560 S.W.2d 236 (Ky. 1977).

It is also well-established that, under the First Amendment, an appellate court must make an independent review of the evidence submitted at trial to determine whether plaintiff has met this concededly heavy burden. *New York Times v. Sullivan, supra,* 376 U.S. at 284-286; *Bose Corp. v. Consumers Union, supra,* 466 U.S. at 514 (1984).

The Kentucky Court of Appeals, in making the *Bose* review, concluded that, if the December 18, 1980 broadcast was interpreted as "of and concerning" the Joint Venture, then "the evidence fails to show actual malice with convincing clarity and the libel claim of the Joint Venture should be dismissed." (PA 23a).

That "failure of proof" ruling ended Petitioner's lawsuit. Therefore, in reality the question for which review is sought is:

> Whether the Kentucky Court of Appeals should have reviewed the evidence supporting the libel verdict to determine whether the Joint Venture proved actual malice with convincing clarity?

However, that question, the one which petitioner actually seeks review of, is explicitly foreclosed by prior decisions of the Court, such as *Bose Corp., supra,* so as to leave no room for controversy. Therefore, the petition for a writ of certiorari should be denied. *Equitable Life Assurance Society v. Brown,* 187 U.S. 308, 311 (1902); *Zucht v. King,* 260 U.S. 174 (1922); *Palmer Oil Corp v. Amerada Corp.,* 343 U.S. 390 (1952).

C. *The Petition Is Based Upon A False Premise.*

Neither at trial, nor in the Kentucky Court of Appeals, nor in its petition to this Court did the petitioner point to a single piece of evidence to support its heavy burden that the respondents believed the December 18, 1980 broadcast to be false or that respondents entertained serious doubts as to its truth. Yet, it was petitioner's burden to prove this "actual malice" by clear and convincing evidence as well as to prove that the statement was, in fact, false. *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767 (1986).

The petition is built on the following false premise found at pages 7-8 of the petition:

> The Plaintiffs [petitioners here] proved at the trial of this case that Defendant Koebrich knew at the time of *these broadcasts* [*i.e.,* the two broadcasts of December 18, 1980] that no civil or criminal charges had ever been filed by any agency or authority against any of the Plaintiffs . . . (emphasis added).

Petitioner then discusses evidence concerning certain knowledge

the reporter had at the time of the broadcast from speaking with the county prosecutor and the attorney from the County Planning Commission (*i.e.*, that the actual filing of charges depended upon the outcome of tests to be performed on the sludge). (Petition, pp. 7-8).

Petitioner erroneously represents to this Court that this evidence relates to the December 18, 1980 broadcast. This is absolutely untrue. The evidence which petitioner relies on as proof of actual malice concerns a broadcast made three weeks later on January 8, 1981.

The distinction between these two broadcasts is clearly made in the special interrogatories submitted to the jury. The Joint Venture's libel claim was submitted to the jury based solely and specifically on the language in the December 18, 1980 broadcast that "civil and criminal actions have been filed." (PA 2a-3a). In contrast, the January 8, 1981 broadcast (RA 9-12) is about Thompson (who was one of the other plaintiffs). Thompson's libel claim was submitted to the jury solely and specifically on the language in the January 8, 1981 broadcast that Thompson was "facing civil and criminal counts." (PA 1a-2a). Thompson's libel claim is not at issue herein.

Although petitioner would like to blur the distinction between these two broadcasts, the record is too clear to allow such a deception. As noted by the Court of Appeals:

> *Regarding the broadcast of January 18, 1981* [sic January 8, 1981], Mr. Koebrich, the reporter, testified that this statement was based on information from the county prosecutor, and from the county planning commission attorney that they were investigating the possibility of filing charges. Koebrich testified that he believed "facing" meant something less than that charges were actually being filed.

(PA 23a [emphasis added]).

The Court of Appeals' conclusion that the evidence on which petitioner now relies related to the January 8, 1981 broadcast is supported by the trial record:

> Q. Mr. Koebrich, you recall, do you not, a story wherein you stated that the Plaintiffs were facing civil and criminal counts?
>
> A. Yes, I do.
>
> Q. Do you recall that story?
>
> A. Yes, I do.
>
> Q. Who told you that they were facing civil and criminal counts, sir?
>
> A. Clark County Prosecutor Dan Donahue and Clark County Planning Commission Attorney David Nahan.
>
> Q. Mr. Koebrich, have you seen any documents wherein Mr. Thompson and Mr. Crum or the Joint Venture were charged with civil or criminal counts?
>
> A. No, sir, the charges were never filed.
>
> Q. Mr. Koebrich, what was the date that you ran that broadcast?
>
> A. I think it was 1-8-81.
>
> MS. WESTERFIELD: Please?
>
> A. I think it was 1-8-81, 5:30 and 11. Yes, it was 1-8-81.

(RA 6; Trial Transcript, October 25, 1985, Vol. II, pp. 84-85).

The January 8, 1981 broadcast (RA 9-12) to which this testimony refers included the following statement by the reporter:

> And *Thompson* is stockpiling more of the stuff just outside of Charlestown, an enterprise for which *he is facing criminal and civil counts.* The proposal he submitted today seeks

> property on which to put even more sludge; property inside the Charlestown ammo plant, open fields the government leases to area farmers.

(RA 11 [emphasis added]).

Thompson is not petitioning this Court. His case has been remanded for retrial. The testimony on which petitioner relies in support of its allegation of actual malice relates to the January 8, 1981 broadcast. That testimony did not deal with the December 18, 1980 broadcast, which is the *only* broadcast the jury considered on the Petitioner's libel count. (PA 2a-3a).

At trial petitioner failed to introduce any evidence at all of actual malice concerning this December 18, 1980 broadcast. Therefore the Kentucky Court of Appeals properly dismissed the libel count for failure of proof of actual malice.

This fact-bound determination of the Kentucky Court of Appeals is not worthy of review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: July 15, 1988

Respectfully submitted,

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RESPONDENTS' APPENDIX

STATE OF INDIANA	)	IN THE CLARK COUNTY COURT
	) SS:	
COUNTY OF CLARK	)	CAUSE NO. 80-M-1414
		OFFENSE: VIOLATION OF ZONING REGULATIONS
STATE OF INDIANA		STATUTE: TITLE IV, SEC. 4.01, ORDINANCE NO. 10, 1954, CLARK
VS.		COUNTY (PENALTY: TITLE V, SEC. 5.04)
ELMER COMBS		

DAVID NACHAND being duly sworn upon oath, says that at the County of Clark, in the State of Indiana, on or about the 14th day of November, 1980, that:

ELMER COMBS did then and there violate *TITLE IV-Zone Regulations, Section 4.01 — Use Requirements, Ordinance No. 10, 1954,* as adopted by the Board of County Commissioners, Clark County, Indiana, in that the said ELMER COMBS did use certain land owned by him, to-wit:

Part of Survey No. One Hundred (100) of the Illinois Grant described thus: Beginning at the most easterly corner of said Survey No. 100, said corner being common to Surveys Nos. 101, 79, and 78 of said Illinois Grant; thence along the southeast side of said Survey No. 100, South 49 deg. 56 min. West, 1117.8 feet, thence North 40 deg. 41 min. West 101.1 feet; thence S. 49 deg. 30 min. West, 157.7 feet; thence North 40 deg. 22 min. West 2678.9 feet; thence North 49 deg. 29 min. East, 1273.4 feet to the line common to Surveys Nos. 100 and 101; thence south 40 deg. 29 min. East, 2789.6 feet, along the northeast side of Survey No. 100, to the place of beginning, containing 81.12 acres, more or less.

for a purpose not in conformity with the uses permitted in the zone wherein said land is located, in that said land owned by ELMER COMBS zoned *"A1" Agricultural* was used for the accumulation of sludge for commercial purpose which use of said land by ELMER COMBS was not authorized as a permitted use under Section 4.04 of said Ordinance, then and there being contrary to the form of Statutes in such cases made and provided and against the peace and dignity of the State of Indiana.

/s/ David Nachand
DAVID NACHAND, Affiant

Subscribed and sworn to before me on this 8th day of December, 1980.

/s/ Daniel F. Donahue
DANIEL F. DONAHUE
Prosecuting Attorney
4th Judicial Circuit
State of Indiana

Approved by me this 8th day of December, 1980.

/s/ Daniel F. Donahue
DANIEL F. DONAHUE
Prosecuting Attorney
4th Judicial Circuit
State of Indiana

DEPOSITION
EXHIBIT
Nachand #4

FILED
DEC 8 1980
/s/ Jo Thomas McCartey
Clerk Clark Superior Court

SUPERIOR COURT FOR THE COUNTY OF CLARK

STATE OF INDIANA

Clark County Plan Commission,
Plaintiff

vs. Cause No. 80-S-158

Elmer Combs,
Defendant

COMPLAINT

Plaintiff by and through its attorney, affirms:

1. That Plaintiff is an agency of Clark County, Indiana, authorized pursuant to the zoning ordinance of Clark County, and Indiana Code 18-7-4-1015, to institute actions such as this for enforcement of the terms of the zoning ordinance of Clark County, Indiana.

2. That the Defendant, at all material times, was and is the owner of and/or has a possessory interest in the following described real estate located in Clark County, State of Indiana:

> Part of Survey No. One Hundred (100) of the Illinois Grant described thus: Beginning at the most easterly corner of said Survey No. 100, said corner being common to Surveys Nos. 101, 79, and 78 of said Illinois Grant; thence along the southeast side of said Survey No. 100, South 49 deg. 56 min. West, 1117.8 feet; thence North 40 deg. 41 min. West 101.1 feet; thence S. 49 deg. 30 min. West, 157.7 feet; thence North 40 deg. 22 min. West 2678.9 feet; thence North 49 deg. 29 min. East, 1273.4 feet to the line common to Surveys Nos. 100 and 101; thence south 40 deg. 29 min. East, 2789.6 feet, along the northeast side of Survey No. 100, to the place of beginning, containing 81.12 acres, more or less.

3. That the Defendant's property is zoned A-1 and that the ordinance of Clark County, Indiana, states the following permitted

uses under said zoning classification:

1. All uses permitted in C1 Zone, plus:
2. One and Two-Family Dwellings.
3. Greenhouses and Nurseries.
4. Churches, Public and Parochial Schools.
5. The Following Uses, if their location is first approved by the Board following a public hearing:
   a. Lodging, Tourist, Nursing or Rest Home.
   b. Processing and Storage of Agricultural Products.
   c. Roadside Stands.
   d. Work Shop or Repair Shop for custom work when located on the same lot with the owner and operator employing not more than two assistants.

4. That the Defendant is currently using said real estate in violation of said ordinance in that said Defendant is storing and/or has dumped approximately 13,000 tons of "sludge" and/or human waste material on the subject real estate for and in anticipation of commercial purposes.

5. That on or about November 14, 1980, the Defendant was notified of said violations which notice Defenant has ignored and violated.

6. That the Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands:

1. An order of this Court against the Defendant, his agents and employees, permanently enjoining said persons from violating the provisions of the Clark County Zoning Ordinance and to enter an order requiring Defendant to remove all "sludge" and/or human waste material stored or hauled to Defendant's real estate in anticipation of a commercial venture.

2. Court costs expended herein, including a reasonable attorney fee.

3. Any and all other legal and proper equitable relief to which Plaintiff may be entitled.

I affirm, under the penalties for perjury, that to the best of my knowledge and belief, the foregoing representations are true.

/s/ David Nachand

DAVID NACHAND,
Attorney for Plaintiff,
416 East Court Avenue,
Jeffersonville, IN 47130
Telephone: (812) 282-1361.

DEPOSITION
EXHIBIT
Nachand #3

-84-

Q. Mr. Koebrich, you recall, do you not, a story wherein you stated that the Plaintiffs were facing civil and criminal counts?

A. Yes, I do.

Q. Do you recall that story?

A. Yes, I do.

Q. Who told you that they were facing civil and criminal counts, sir?

A. Clark County Prosecutor Dan Donahue and Clark County Planning Commission Attorney David Nahan.

Q. Mr. Koebrich, have you seen any documents wherein Mr. Thompson and Mr. Crum or the joint venture were charged with civil or criminal counts?

A. No, sir, the charges were never filed.

Q. Mr. Koebrich, what was the date that

-85-

you ran that broadcast?

A. I think it was 1-8-81.

MS. WESTERFIELD: Please?

A. I think it was 1-8-81, 5:30 and 11. Yes, it was 1-8-81.

(12-18-80 at 5:30 P.M. — Stipulated date)

TELEPROMPTER: More than 20,000 tons of sewage sludge from Louisville, illegally stored on property in Clark County, may soon be the target of more court action.

Our Indiana Bureau Chief, Mark Koebrich, reports that if efforts to remove the sludge aren't under way soon, the Clark County Prosecutor's office will initiate a series of $300-a-day fines.

MR. KOEBRICH (Video): The first truckloads of sludge arrived in Clarksville in mid-August unannounced and unwanted.

FEMALE INTERVIEWEE: I'm against it, and it appears that everyone else down here that has property is completely against both the dumping, the odor, the possible contamination to our well water, because we do not have city water.

MR. KOEBRICH (Video): In a similar move not more than a month later, the firm started trucking the stuff to a site east of Charlestown with the same results.

MALE INTERVIEWEE: I don't like to see my community made a place to pile crap.

MR. KOEBRICH (Video): Angry Indiana officials ordered the firm to stop hauling and clear both sites, a directive they've ignored. So now, the Clark County

(12-18-80 at 5:30 P.M. — Stipulated date)

Prosecutor's office is getting tough. Civil and criminal actions have been filed citing violations of zoning regulations at the Charlestown site, the land clearly designated for agricultural use only, not industrial or commercial use.

Clark County Prosecutor, Dan Donahue, says he'll press harder, if necessary.

MR. DONAHUE: If immediate action isn't undertaken by the first of the year, then we will begin to take immediate action on a daily basis.

MR. KOEBRICH (Video): A daily basis means a $300-a-day fine for every day the sludge remains where it is. Attempts today to reach the Louisville firms involved in the sludge operation were unsuccessful.

Mark Koebrich, 32 Alive News, Indiana.

* * *

pltf. Exh. APPENDIX p. 163

(12-18-80 at 11:00 P.M.)

TELEPROMPTER: More than 20,000 tons of sewage sludge from Louisville, illegally stored on property in Clark County, may soon be the target of more court action. The Louisville firm that trucked the material to sites in Clarkesville and Charlestown late last summer, has so far ignored directives to remove it.

Some civil and criminal action has already been taken, but Clark County Prosecutor, Dan Donahue says he'll press harder, if necessary.

MR. DONAHUE: If immediate action isn't undertaken by the first of the year, then we will begin to take immediate action on a daily basis.

MR. KOEBRICH (Video): Okay. So that we're talking about a fine —

MR. DONAHUE: (Interrupting) We're talking about a maximum $300 fine under the ordinance.

TELEPROMPTER: That's $300 a day in penalties. No comment today from the sludge firms in Louisville involved in the operation.

* * *

Pltf. Exh. APPENDIX p. 164

(1-8-81 at 5:30 P.M.)

TELEPROMPTER: Bids were opened today on some 700 acres of farmland at the Charlestown Army Ammunition Plant. The army is leasing the acreage for crops. But one of those bidding today was a Louisville businessman not exactly known for his endeavors in agriculture.

Our Indiana Bureau Cheif, Mark Koebrich, has the story.

MALE ON-CAMERA VOICE: High bid is $400 by Gale Combs.

MR. KOEBRICH (Video): Most of the group present for today's bid opening were farmers, but this man isn't. He's Louisville businessman, Tommy Thompson; better known in southern Indiana as the sludge salesman. It's also known he doesn't like interviews.

(To Mr. Thompson) We're surprised to see you here, because you're really not known for your farming exploits; you're — you're better known for your exploits in sludge. And I'm just curious to know if maybe this has anything to —

Mr. Thompson: (interrupting) Fertilizer.

MR. KOEBRICH (Video): Excuse me. Fertilizer. (Continuing) — if this has something to do with your sludge oper — excuse me — fertilizer operation. Can

(1-8-81 at 5:30 P.M.)

you enlighten us a little?

Thompson's sludge-hauling operation in southern Indiana hasn't won him a lot of friends. Officials in Clarksville have given him until the last of March to clear out of this site. It's extimated there's 4,000 tons of sludge here, a by-product of Louisville's sewage treatment process. And Thompson is stockpiling more of the stuff just outside of Charlestown, an enterprise for which he is facing civil and criminal counts.

Today, he submitted a proposal seeking to move even more sludge into Indiana; this time to the Charlestown Army Ammu-

nition Plant, the fields on the plant's grounds that are leased to area farmers. Thompson's bidding for a lease, even though the government states very clearly land can be used for crops only. And there are other problems.

MR. McCLELAN: Well, the government says that they can't accept outside waste. And we here at the plant can't make a decision.

LT. COL. ORTON: The department of defense has a policy that its installations will not accept any waste products generated off the installation.

MR. KOEBRICH (Video): Thompson's motiviations in wanting to locate here are understandable. A 10,000-acre federal reservation is the ideal place for his

Pltf. Exh. APPENDIX p. 166

(1-8-81 at 5:30 P.M.)

much maligned sludge project. After all, on a property of this size, he doesn't have to contend with angry neighbors or local units of government. But the chances of his actually ending up here appear to be slim.

Mark Koebrich, 32 Alive News, Indiana.

* * *

Pltf. Exh. APPENDIX p. 167

(1-8-81 at 11:00 P.M.)

TELEPROMPTER: Officials at the Charlestown Army Ammunition Plant today opened bids on some 700 acres of farmland. The acreage is being leased to area farmers for crops. But one of the bidders was not a farmer; he's a Louisville business man with a reputation in an area other than agriculture.

Our Indiana Bureau Chief, Mark Koebrich, has the story.

MR. KOEBRICH (Video): His name is Tommy Thompson. In southern Indiana, he's better known as the sludge salesman, a title and a business that haven't won him a lot of friends. He doesn't like to talk about it.

(To Mr. Thompson) The fact that you're here leads to speculation that maybe you're considering leasing land for another mixing site. Is that a possibility. You're really not known in the valley as a farmer, sir, more as a businessman. Can you — could you comment? Would you prefer not to comment?

Thompson's sludge-hauling operation has two southern Indiana communities in an uproar. Officials in Clarksville have given until the last of March to clear out of this site. It's estimated there's 4,000 tons of sludge here, a by-product of Louisville's sewage treatment process.

And Thompson is stockpiling more of the stuff

(1-8-81) at 11:00 P.M.)

just outside of Charlestown, an enterprise for which he is facing criminal and civil counts. The proposal he submitted today seeks property on which to put even more sludge; property inside the Charlestown ammo plant, open fields the government leases to area farmers.

Thompson's motivations in wanting to locate here are understandable. A 10,000-acre federal reservation is the ideal place for his much maligned sludge project. After all, on a property of this size, he doesn't have to contend with angry neighbors or local units of government. But the chances of his actually ending up here appear to be slim.

That's because government regulations state clearly the land can be used for crops only.

LT. COL. ORTON: The department of defense has a policy that its installations will not accept any waste products generated off the installation.

MR. KOEBRICH (Video): Officials here are doubtful Thompson's request will be approved.

Mark Koebrich, 32 Alive News, Indiana.

* * *

Pltf. Exh. APPENDIX p. 169

87-2076

No. 87-2706

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

J & C, INC. and T-K CO.,
A Joint Venture - - - - - - Petitioner

versus

COMBINED COMMUNICATIONS CORPORATION OF KENTUCKY, INC., and
MARK KOEBRICH - - - - - Respondents

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR PETITIONER IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

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No. 87-2706

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

J & C., Inc. and T-K Co.,
A Joint Venture - - - - *Petitioner*

v.

Combined Communications Corporation of Kentucky, Inc., and
Mark Koebrich - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

ARGUMENT IN REPLY

The Respondents seek to persuade this Court that:

> . . . the fact that the Joint Venture was not named in the [December 18, 1980] broadcast had absolutely no effect upon the Court's decision to dismiss the libel claim [against them] (Respondent's Brief, p. 5).

In fact, of course, the Kentucky Court of Appeals specifically considered and rejected the notion that the Joint Venture could base a libel claim upon a

broadcast in which it was not specifically named, when it began a lengthy sentence with the clause, "Although it may be argued that the broadcast could be interpreted to infer that the charges were against "the firm" (Joint Venture)" (Petitioner's Appendix, p. 23a). This fact is true even though the remainder of the sentence to which this clause was attached states that since business entities have no right of action for "false light", there was not enough evidence to show actual malice with convincing clarity, and the claim for libel should be dismissed, all of which appears to Petitioner to be beside the point.

In a more lucid moment, the Kentucky Court of Appeals indicated that it clearly believed that the existence of civil and criminal charges against the landowner of the site where the Joint Venture stored its materials, one Oscar Combs, meant that the Petitioner could not maintain a libel claim. The court stated in its opinion that:

> There had in fact been civil and criminal actions filed against the property owner at the Charlestown [sic] site. *Consequently,* it cannot be said that the broadcast was made with the knowledge that the information was false or with reckless disregard of its truth or falsity (Plaintiff's Appendix, p. 23a, emphasis added).

Clearly, the Court equated the broadcast's not naming the Petitioner directly as dispositive of the validity of Petitioner's libel claim. Just as clearly, it created this equation upon the premise that such a failure of direct identification negates any possibility that the

Petitioner could prove Constitutional "actual malice." In other words, the Court of Appeals held that this Court's "actual malice" standards completely defeat any possibility that a defamation plaintiff can prevail if he has to resort to common-law rules of colloquium in a lawsuit against a media defendant.

Not surprisingly, the Respondents failed to confront the Petitioner's argument that such a "rule of law" is outrageous.

However, they did exhibit a sort of "back-up" argument. It is to the effect that the Kentucky Court of Appeals actually considered the possibility that the December 18, 1980 broadcast was, ". . . of and concerning," the Petitioner and in the course of that consideration determined that the Petitioner had failed to prove Constitutional "actual malice" with convincing clarity (Respondent's Brief, pp. 7-8).

This is preposterous.

The Court of Appeals discussed at some length the evidence upon which it held that the Plaintiff H. W. Thompson was entitled to go to a jury upon remand of his libel claim, which was predicated upon the Respondent's January 18, 1981, broadcast (Petitioner's Appendix, pp. 23a-24a). However, it said nothing about the evidence of "actual malice" relating to the December 18, 1980, broadcast, the one at issue in this Petition, except that it opined that the existence of criminal and civil charges against the landowner of the Charlestown site precluded a finding of Constitutional "actual malice".

This, of course, is not the supposedly "non-existent" evidence that the Respondents had in mind.

Fortunately, the Respondents' charade is revealed in their Brief itself. At page 8 of their Brief, the Respondents label the following quotation from the Petition as a "false premise":

> The Plaintiffs [Petitioners here] proved at the trial of this case that Defendant Koebrich knew at the time of these broadcasts [i.e. the two broadcasts of December 18, 1980] that no civil or criminal charges had ever been filed by any agency or authority against any of the Plaintiffs (Petition, pp. 7-8, as quoted in Respondent's Brief, p. 8).

The Respondents later in their Brief cite testimony from Koebrich including the following colloquy:

> Q. Mr. Koebrich, have you seen any documents wherein Mr. Thompson and Mr. Crum or the Joint Venture were charged with civil or criminal counts?
>
> A. No, sir, the charges were never filed (Respondent's Brief, p. 10).

If this evidence of knowledge of falsity by Koebrich is not general enough, we have the fact that elsewhere in his testimony, as we have seen (Petition, pp. 7-8), Koebrich admitted that he knew that no civil or criminal charges were ever filed against the Joint Venture (Transcript of Evidence, 8th day, Vol. I, p. 57) when he created his series of broadcasts about it and the other Plaintiffs below. To say that Koebrich's testimony related only to one of these broadcasts is like

saying that a blast from a birdhunter's shotgun relates to only one of the pellets in the shell. The bird knows better.

Perhaps such "arguments" should be expected from a media defendant. Obviously, the media believe that the whole world should believe in the existence of never-never land just like it does. In this land, of course, the media can never, never do any wrong, since be definition all of its actions are right. Unable to meet Petitioner's arguments, Respondents invite us to their special domain. It is an invitation we should refuse.

Respectfully submitted,

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